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AUG 13 1956
JOHN T. FEY, Clerk

No. 326

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

LESLIE ROBERT NUNN,
Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

JURISDICTIONAL STATEMENT

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California
Attorney for Appellant

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IN THE

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October Term, 1956

LESLIE ROBERT NUNN, *Appellant,* vs. PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*	No. .....

JURISDICTIONAL STATEMENT

To The Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The opinion of the Supreme Court of the State of California is reported in 46 Advance California, No. 18, page 465.

JURISDICTION

Jurisdiction is invoked under Title 28, §1257(2) U. S. Codes. The opinion of the Supreme Court of California was rendered May 8, 1956. Rehearing was denied June 6th, 1956.

Notice of Appeal to the Supreme Court of the United States was duly filed in the Supreme Court of California June 15th, 1956. The record and this Jurisdictional Statement is being filed prior to August 15th, 1956.

STATUTES INVOLVED

This case involves the constitutionality of Section 11163, 11164 and 11170, 11170.5 and 11710 of the Health and Safety Code of the State of California. The statutes read as follows:

> "§11163. *Narcotic not to be prescribed etc., for person not under treatment.* Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division."
>
> *
>
> "§11164. *Narcotic Prescription, etc., for addict forbidden; Exceptions.* No person shall prescribe for or administer, or dispense a narcotic to an addict, or to any person representing himself as such, except as permitted by this division."
>
> *

"§11161. *Persons authorized to write.* No person other than a physician, dentist, chiropodist or veterinarian shall write a prescription."

Section 2137 of the Business & Professions Code, reads as follows:

"§2137. *Practice authorized by physician's and surgeon's certificate.* The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical or mental conditions. (Added Stats. 1937, c. 414, p. 1377)."

"§11330. A physician may prescribe for, furnish to, or administer narcotics to his patient, when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction. The physician shall prescribe, furnish or administer narcotics only when in good faith he believes the disease, ailment, injury, or infirmity, requires such treatment. The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as are reasonably necessary."

•

"§11170. *Acts and statements prohibited.* (1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact.

(2) No person shall make a false statement in any prescription, order, report, or record, required by this division.

(3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be, a manufacturer wholesaler, pharmacist, physician, dentist, veterinarian, or other authorized person.

(4) No person shall affix any false or forged label to a package or receptacle containing narcotics.

*

"§11170.5. *False name and address.* No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

*

"§11710. *Immunity of peace officers from prosecution.* All duly authorized peace officers, while investigating violations of this division in performance of their official duties, and any person working under their immediate direction, supervision or instructions, are immune from prosecution under this division. [Added by Stats. 1953 ch. 1770 §5.]"

ii

The judgment sought to be reviewed was filed by the Supreme Court of California May 8th, 1956. Petition for rehearing was filed and order denying rehearing was filed June 6th, 1956. Notice of Appeal was filed June 15th, 1956.

iii

Jurisdiction is conferred by Title 28, Section 1257(2), U. S. Codes.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States, is contained in 28, Section 1257 (2) U. S. Codes, which grants jurisdiction "by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

CASES BELIEVED TO SUSTAIN JURISDICTION

Lisenba v. California, 314 U.S. 219, 86 L. Ed. 166;

Rochin v. California, 342 U.S. 165, 96 L. Ed. 183;

On Lee v. United States, 343 U.S. 747, 96 L. Ed. 1270;

Schwartz v. Texas, 344 U.S. 199, 97 L. Ed. 231;

Hebert v. Louisiana, 272 U.S. 312, 71 L. Ed. 270;

Grosjean v. American Press Co., 297 U.S. 233;

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117;

Barsky v. Board of Regents of New York, 347 U.S. 442, 98 L. Ed. 829;

Jordan v. De George, 341 U.S. 223, 95 L. Ed. 886;

Winters v. New York, 333 U.S. 507, 92 L. Ed. 839;

U. S. v. L. Cohen Grocery Co., 255 U.S. 81, 65 L. Ed. 516;

Lanzetta v. New Jersey, 306 U.S. 451, 83 L. Ed. 888;

Williams v. North Carolina, 317 U. S. 287, 87 L. Ed. 279;

U. S. v. Five Gambling Devices, 346 U.S. 441, 453;

Connally v. General Const. Co., 269 U.S. 385, 391; 70 L. Ed. 322, 328;

Sorrells v. United States, 287 U.S. 435, 77 L. Ed. 413;

Olmstead v. United States, 277 U.S. 493, 72 L. Ed. 944;

Mooney v. Holohan, 294 U. S. 103; 98 A.L.R. 406.

STATUTES OF THE STATE INVOLVED

Section 11163, 11164, 11165, 11710, 11770, 11170.5, 11171 and 11330 of the Health & Safety Code, and 2137 Business and Professions Code of California.

VI.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether the expression, "except in the regular course of his profession" contained in the Health & Saftey Code is so vague, indefinite and uncertain as to be invalid criminal legislation, or the basis for criminal prosecution of a licensed osteopathic physician.

2. Whether the words "good faith" as set out in Section 11330 Health & Safety Code are unconstitutional (inherently and as construed and applied in this case) as being too vague, indefinite and uncertain to form the basis of a criminal prosecution of a licensed osteopathic physician.

3. Whether the determination of "good faith," if sufficiently definite, is upon the physician or the narcotic officer.

4. Whether the words "addict" in Section 11009 Health & Safety Code is unconstitutionally vague.

5. Whether immunity of narcotic officers from prosecution for violating Sections 11163 and 11164 of the Health and Safety Code permits narcotic officers to use fraud, deceit, misrepresentation, and subterfuge and to conceal his identity to obtain a narcotic prescription from a licensed doctor. Whether Sections 11163, 11164 and 11710, Health & Safety Code are constitutionally construed and applied in this case to provide American standards for the administration of justice.

6. Whether evidence obtained by such conduct, as generally forbidden to all persons by the express language of California's statutes, is proscribed by the process of law of the 14th Amendment, U. S. Constitution.

7. Whether the knowing use by state officers of evidence obtained by fraud, deceit, misrepresentation and subterfuge and false identity in a state court trial is a denial of due process of law under the 14th Amendment, U. S. Constitution the same as the knowing use of perjured testimony forbidden by *Mooney v. Holohan,* 294 U. S. 103.

8. Whether the courts must preserve their own purity and reject evidence knowingly obtained by falsity, fraud, deceit and misrepresentation. Whether the California statutes, construed to allow the use of such evidence obtained by such means in a criminal trial violate the due process clause of the 14th Amendment, U. S. Constitution.

9. Whether the conduct of the officers in this case constituted entrapment forbidden as against public policy and which a court must reject at any stage of the case *(Sorrels v. U. S.,* 287 U.S. 435.)

CONCISE STATEMENT OF THE CASE

The appellant was a licensed osteopathic physician in the State of California. On February 3, 1954, a narcotic officer representing himself to be a patient, using a fictitious name, and falsely representing that he was a narcotic user, induced the doctor, on four occasions, to write a prescription for a narcotic, to-wit: dilaudid, a proprietary preparation containing a narcotic. The officer falsely represented himself to be an "addict".

The officer, after receiving the prescriptions, paid the doctor varying sums of money ranging from $10.00 to $50.00.

California's Health & Safety Code in Section 11170 provides that: "*No person* shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact. (2) *No person* shall make a false statement in any prescription, order, report, or record, required by this division. (3) *No person* shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian, or other authorized person."

Section 11170.5 of the Health & Safety Code provides: "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address.

Section 11171 of the Health & Safety Code says that: "No person shall obtain or possess a prescription that does not comply with this division."

The narcotic officer violated each of these provisions by representing himself to the doctor to be an authorized person, and by using a false and fictitious name and character.

The Supreme Court of California held that since statutory immunity was given to officers that the use of false character and fictitious names by an officer in obtaining of a narcotic prescription was authorized by the statute. The District Court of Appeal of the State of California thought that the conduct of the officer was unauthorized, but it felt that it could not reverse the case in view of previous decisions of the Supreme Court. The Supreme Court of California affirmed the conviction six-to-one, one justice holding that the conduct of the officer makes the statute, as construed and applied, in violation of the Fourteenth Amendment to the Constitution of the United States. This justice wrote as follows:

> CARTER, J.—I dissent.
>
> I cannot agree that any law of the State of California permits an officer to go about using a fictitious name and make false statements to induce a doctor to prescribe a narcotic or medicine that requires a prescription for a patient, and to misrepresent that he is such patient. Such conduct, whether by an officer, or anyone else, violates sections 11170, 11170.5 and 11171 of the Health and Safety Code.

Section 11170 of the Health and Safety Code provides as follows: "(1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact. . . . (3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be [here follows a list of authorized persons] *or other authorized person.* . . . " (Emphasis added.)

Section 11170.5 of the Health and Safety Code says: "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

Section 11171 reads: "*No person* shall obtain or possess a prescription that does not comply with this division." (Emphasis added.)

It is plain from the foregoing that the officer violated every one of these mandates of the Legislature. He obtained each of the prescriptions involved in this case (a) by fraud, deceit, misrepresentation, and subterfuge; and (b) he concealed a material fact, namely his true identity.

He represented himself to be an authorized person, which he was not.

He obtained and possessed prescriptions that did not comply with the provisions of the Health and Safety Code. Thereafter he falsely had them filled in violation of section 11170 of the Health and Safety Code.

The Legislature clearly intended these sections to apply to *all persons.*

False and fictitious use of one's name and misrepresentation of one's character are fraud and deceit, which the statute expressly forbids. Fraud vitiates everything. It nullifies judgments obtained thereby.

If these statutes that expressly forbid *any person* to use these means, are changed by judicial construction, to authorize an officer to obtain a prescription (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by concealment of a material fact, or by giving a false name or address, or obtain or possess a narcotic that does not comply with these provisions of the Health and Safety Code, then such sections, if thus construed and applied, violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. That constitutional guarantee provides for American standards for the administration of justice and conduct consistent with the fundamental principles of liberty and justice must lie at the base of all our civil and political institutions. (*Hebert v. Louisiana,* 272 U.S. 312, 316 [47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102] *Twining v. New Jersey,* 211 U.S. 78, 100 [29 S.Ct. 14, 53 L.Ed. 97]; *Palko v. Connecticut,* 302 U.S. 319, 323, 325, 326 [58 S.Ct. 149, 82 L.Ed. 288]; *Francis v. Resweber,* 329 U.S. 459, 463 [67 S.Ct. 374, 91 L.Ed. 422]; *Adamson v. California,* 332 U.S. 46, 53 [67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223].)

The obtaining of a prescription from a duly licensed doctor by means of fraud, deceit and misrepresentation—in violation of the express commands of the Legislature—is reprehensible, unlawful, and contrary to the conscience of mankind.

This court is not authorized to legislate that it is lawful or to condone it judicially. If it does, then the statutes, as thus construed, violate the Fourteenth Amendment to the Constitution of the United States.

If the knowing presentation of perjured testimony in a criminal prosecution amounts to the denial of due process of law (*Mooney v. Holohan*, 294 U.S. 103 [55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406]), it should follow as a matter of course that evidence obtained by means of fraud, deceit and misrepresentation should have the same effect.

The purity of the courts belongs to the courts. (*Sorrells v. United States*, 287 U.S. 435 [53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249]; *People v. Cahan*, 44 Cal. 2d 434 [282 P. 2d 905] and cases cited therein.)

When the officer in this case falsified his name and character he acted in an individual capacity, for the state did not authorize him to act falsely and fraudulently and to violate the express provisions of the Health and Safety Code. But if we approve such conduct then we become a party to it. This the court cannot do, lest the citizen shall say, "If the officer can falsify, why can't we?" Courts of justice must set an example of truth and justice and equal application of the law's mandates to officers and citizens alike, lest the bad example of one shall lead to misconduct of the other. Civilized standards of due process guaranteed by the federal Constitution forbid this.

I do not think this court or any court should ratify, adopt and approve such lawless disregard

> of honesty, decency and the express and plain provisions of the Health and Safety Code as written and adopted by our lawmakers.
>
> For the foregoing reasons and those stated in my dissenting opinion in *People v. Braddock*, 41 Cal. 2d 794, 803 [264 P. 2d 521], I would reverse the judgment and grant defendant a new trial.

This appeal not only raised the constitutionality of the statutes involved, as construed and applied, by reason of the conduct of the officers, but also the question of whether the statute containing the expression "except in the regular course of his profession" and the words "good faith" and "addict" are too vague, indefinite and uncertain in their context to form a standard of criminal guilt.

Also, whether Section 11164 of the Health & Safety Code of California in prohibiting a doctor from treating narcotic addiction is constitutional, and whether the determination of when and how a narcotic should be applied should be left to the physician, or determined by a narcotic agent.

The questions were first raised in the District Court of Appeal, Second Appellate District, State of California, which affirmed the judgment, but which court had this to say:

> "The transactions here in question were between the two men, the state narcotic inspector and the doctor. So it became important to state pertinent portions of the testimony of the inspector, as follows:

"The doctor gave the inspector prescriptions for dilaudid twice at the doctor's office in Santa Monica, and twice at the doctor's home in the Malibu Hills. For these prescriptions the inspector paid the doctor $150 in cash.

"On his first visit, February 3, 1954, the inspector met the doctor in his outer office. He said: 'I am Dillon.' The doctor asked him: 'Are you the one Walter sent?' and he said 'Yes.'

"None of these statements by the Narcotics officer was true. His name was not Dillon, and nobody by the name of Walter had sent him to the doctor. He had been instructed by his superior officers in the state narcotic division to use the fictitious name.

"And, the law forbids any person to 'obtain or attempt to obtain narcotics (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact.' (Section 11170, Health and Safety Code.), or the giving of a false name or address in connection with the prescribing of a narcotic. (Section 11170.5, Health and Safety Code.)

Returning now to the inspector's testimony.

The two men then went into the doctor's private office. There the doctor "asked me my first name, and I said it was 'Joe'."

Then the doctor handed the inspector a 'diagnosis card,' which the inspector signed, 'Joe Dillon.' The card is in evidence.

"Defendant argues that the conduct of the narcotics officers in securing the evidence which resulted in his conviction was fraudulent, deceptive,

and in violation of the very law they are employed to enforce. The danger inherent in such police methods is well stated by Mr. Justice Traynor, speaking for our Supreme Court, in the landmark case of *People v. Cahan,* 44 A.C. 461, at page 472:

Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, *The Wolf Case,* 45 Ill. L. Rev. 1, 20.) 'Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in *Olmstead v. United States,* 277 U.S. 438, 485 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376] see also *State v. Owens,* 302 Mo. 348, 377 [259 S.W. 100, 32 A.L.R. 383]; *Atz v. Andrews,* 84 Fla. 43 [94 So. 329, 332]; *Youman v. Commonwealth,* 189 Ky. 152 [224 S.W. 860, 866, 13 A.L.R. 1303]; *State v. Arregui,* 44

Idaho 43 [254 P. 788, 792]; *State v. Gooder*, 57 S.D. 619 [234 N.W. 610, 613].)

"However, this Court is of the opinion that as an intermediate Court it is required to follow at least two recent decisions of our Supreme Court, and affirm the judgment in this case."

Again the questions of the unconstitutionality of the statute and procedure were raised in the Supreme Court of California and argued therein, and that court affirmed the judgment by a six-to-one decision, passing on the question herein involved in its opinion.

The questions here are substantial in determining whether the conduct of the officers, as exhibited in this case, comport with American standards of justice, or are so obnoxious as to violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The conduct of the officer in this case was as reprehensible as that condemned by this Court in *Irvine v. California,* 347 U.S. 128, 98, L. Ed. 561 and by *Rochin v. California,* 342 U.S. 165, 96 L. Ed. 183.

Whether a narcotic officer may use fraud, deceit, misrepresentation or subterfuge and concealment of a material in approaching a doctor for a prescription and whether evidence thus obtained "provides for American standards of the Administration of Justice, consistent with the fundamental principles of Liberty and Justice which lie at the base of all or civil and political institutions" should be construed by this court.

It affects the thousands of doctors in the United States.

This court has held that "use of testimony knowingly obtained by the state which is perjured is forbidden *(Mooney v. Holohan,* 294 U.S. 103). Likewise evidence obtained by fraud, deceit, misrepresentation or subterfuge "knowingly by an officer of the state, should not be permitted in the court of Justice. This requires plenary action by this court. The purity of the court belongs ot the courts." *(Sorrells v. United States,* 287 U.S. 436: *People v. Cahan,* 44 Cal. 2d 434).

This kind of conduct calls for rejection at any stage of the proceedings.

Sorrells v. U. S., 287 U.S. 435. (Opinion of Brandeis in *Olmstead v. U. S.,* 277 U.S. 493.)

The question of the vagueness and indefiniteness of statutes also requires plenary consideration, as this court has on numerous occasions held that a statute which is too vague, indefinite and uncertain as to form a reasonable standard of guilt must be rejected.

Connally v. General Construction Co., 269 U.S. 385, 391.

U. S. v. L. Cohen Grocery Co., 255 U.S. 81.

Winters v. New York, 333 U.S. 507.

The phrase "Except in the regular practice of his profession" is unconstitutionally vague. What is the "regular practice" of a doctor's profession? Where is that expression defined? No penal statute sets it forth.

Nor are the words "good faith" as used in Section 11330 Health & Safety Code of California any more definite. These words have many meanings in many places. But what constitutes good faith of a physician in prescribing and when he acts in bad faith are not defined by any California statute, and leave each juror to set up his or her own standard of guilt.

Likewise the word "addict" is unconstitutionally vague. Who is an "addict"? The statute fails to define it. And who is to determine the doctor's good faith—the doctor or the narcotic officer? The statute fails to set up any standard. The responsibility is on the *doctor*. As construed in this case the standard was set up by the *narcotic officer* instead.

ENTRAPMENT

In this case the record is that of a physician, approached by a narcotic inspector in a fictitious name and character, for the purpose of inducing the doctor to write prescriptions for him. Such conduct on the part of the officer is contrary to public policy and voids the judgments at any stage. No decent society should permit them to stand.

Sorrells v. U. S., 287 U.S. 435.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant

APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Criminal
vs.	)	No. 5282
LESLIE ROBERT NUNN,	)	
Defendant and Appellant.	)	

Dist. Court of Appeal—Second Dist.

FILED May 31, 1955.

J. E. BROWN, *Clerk*

....., *Deputy Clerk*

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred L. Lillie, Judge, and from an order denying motion for a new trial. AFFIRMED.

For Appellant: Morris Lavine.

For Respondent: Edmund G. Brown, Attorney General, and Elizabeth Miller, Deputy Attorney General.

Defendant, Leslie Robert Nunn, is an osteopathic physician, licensed to practice in the State of California. He was convicted by a jury of four counts of prescribing narcotics for a person not under his treatment for a pathology, in violation of Section 11,163 of the Health and Safety Code. He was also convicted of a fifth count, for prescribing a narcotic for a person "who represented himself to be an addict," in violation of Section 11,164 of the same code. He admitted a prior conviction of a felony, for which he served a term in a California penitentiary. He appeals from the judgment of the Superior Court, committing him to state's prison for the term prescribed by law, and from the court's order denying his motion for a new trial.

Concededly the doctor gave prescriptions for dilaudid on four different occasions to a narcotic inspector of the State of California. Dilaudid is a derivative of morphine, with much the same effects, but less likely to form a habit.

The doctor testified that he wrote out the presciptions and gave them to the inspector in the conscientious belief that the medication was to relieve his patient's pain, caused by migraine headache. But the jury found against this defense, and unless there is some prejudicial error at law in the case the judgment will have to stand.

Defendant assigns as error the following.

1. That he was entrapped by law officers of the State of California.

2. That the evidence was insufficient to sustain the verdicts, and that the verdicts are contrary to the law and the evidence.

3. That the court erred in the admission of testimony.

4. That the code sections here applicable are unconsitutional.

5. That the court erred in instructions given and refused.

The defense of entrapment presents the most serious question. That and the sufficiency of the evidence will be commented upon together.

The transactions here in question were between the two men, the state narcotic inspector and the doctor. So it becomes important to state pertinent portions of the testimony of the inspector, as follows:

The doctor gave the inspector prescriptions for dilaudid twice at the doctor's office in Santa Monica, and twice at the doctor's home in the Malibu Hills. For these prescriptions the inspector paid the doctor $150 in cash.

On his first visit, February 3, 1954, the inspector met the doctor in his outer office. He said, "I am Dillon." The doctor asked him: "Are you the one Walter sent?" and he said "Yes."

None of these statements by the narcotic officer was true. His name was not Dillon, and nobody by the name of Walter had sent him to the doctor. He

had been instructed by his superior officers in the state narcotic division to use the fictitious name.

And, the law forbids any person to "obtain or attempt to obtain narcotics (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact." (Section 11170, Health and Safety Code.), or the giving of a false name or address in connection with the prescribing of a narcotic. (Section 11170.5, Health and Safety Code.)

Returning now to the inspector's testimony.

The two men then went into the doctor's private office. There the doctor "asked me my first name, and I said it was 'Joe'."

Then the doctor handed the inspector a "diagnosis card," which the inspector signed, "Joe Dillon." The card is in evidence. It authorizes the doctor to treat "Mr. Dillon". On it appear the words written in by the doctor: "1. Migraine headache; 2. Narcotics addiction." The inspector testified that that writing was not on the card when it was handed to him to sign.

The inspector also testified that he did not tell the doctor that he was suffering from migraine headache. He also denied the testimony of the doctor, a patient in the doctor's office, and the doctor's wife that he held his hand to his head and feigned great pain.

The inspector further testified that when he signed the card the doctor asked him what he was using, and he said "I am using H." Then the doctor said, "I cannot write a prescription for heroin, but I can write

for some legitimate drug like morphine or dilaudid." The inspector said that would be all right. Whereupon the doctor wrote and signed a prescription calling for 60 tablets of 1/16 grain dilaudid.

On the second occasion, February 10th, the inspector telephoned the doctor from Ridgecrest, a town out in the Mojave desert, and asked him if he could call the next day instead of the 10th, when they had an appointment. The doctor told the inspector that that was his day off, but that the inspector could come to the doctor's home in Malibu. So the inspector saw the doctor at his home on February 11th. There the doctor wrote out and gave him another prescription for dilaudid.

On the third occasion the inspector again saw the doctor at his home, and again was given a prescription for dilaudid.

On the fourth and final occasion the inspector saw the doctor at his office, pursuant to a telephone call made by the inspector from a pay station. On this occasion the doctor again wrote out a prescription for dilaudid and gave it to the inspector. When the doctor was called into another room to see another patient, the inspector left the money for that prescription on the doctor's desk, and walked out.

These occasions were each about a week apart. Shortly after the last one the doctor was arrested.

Defendant argues that the conduct of the narcotics officers in securing the evidence which resulted in his conviction was fraudulent, deceptive, and in violation

of the very law they are employed to enforce. The danger inherent in such police methods is well stated by Mr. Justice Traynor, speaking for our Supreme Court, in the landmark case of *People v. Cahan,* 44 A.C. 461, at page 472:

> "Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, *The Wolf Case,* 44 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in *Olmstead v. United States,* 227 U. S. 438, 485 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376] see also *State v. Owens,* 302 Mo. 348, 377 [259 S.W. 100, 32 A.L.R. 383]; *Atz v. Andrews,* 84 Fla. 43 [94 So. 329, 332]; *Youman v. Commonwealth,* 189 Ky. 152 [224 S.W. 860, 866, 13 A.L.R. 1303]; *State v.*

Arregui, 44 Idaho 43 [254 P. 788, 792]; *State v. Gooder,* 57 S.D. 619 [234 N.W. 610, 613].)"

However, this Court is of the opinion that as an intermediate Court it is required to follow at least two recent decisions of our Supreme Court, and affirm the judgment in this case.

The law laid down in those cases is that "Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused." Also "Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." And "Where the record shows a conflict in the evidence, the judgment will not be reversed." *(People v. Terry,* 44 A.C. 398; *People v. Braddock,* 41 Cal. 2d 794.)

In this case the jury could have inferred defendant's criminal intent from all the circumstances in evidence. He charged $150 for writing the four prescriptions. He did not make any physical examination of his fictitious patient. He spent little time upon his patient, no more than to make brief inquiry and to write the prescriptions. He prescribed an inordinate quantity of the drug—60 tablets the first time, 85 the second and third times, and 80 the last time.

It was said in *Davis v. State Board of Medical Examiners,* 108 Cal. App. 2d 346, that the following

circumstances are pertinent in determining whether a doctor's prescription of narcotics was lawfully made: The lack of any real examination of the alleged patient, the fees charged, the lack of instructions to the patient as to treatment, or the use of the drug, and the temporary character of the remedy, without any consideration of permanent cure.

Turning now to defendant's contentions as to the evidence and the instructions.

He contends that it was error to admit in evidence testimony of a narcotics inspector of his opinion as to the causes generally of narcotics addictions. This was in rebuttal of the doctor's testimony that he believed it was quite possible that the majority of narcotics addictions are caused by prescriptions for the relief of pain.

No error appears in the admission of this evidence or in the qualifications of the witness as an expert.

Defendant contends that the conduct of the narcotics inspector who obtained the evidence against him required the giving of two proposed instructions, which were refused:

1. "You are further instructed that Section 11170.5 of the Health and Safety Code of the State of California provides that no person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

2. "Section 11170 of the Health and Safety Code of the State of California provides: 1. No person shall obtain or attempt to obtain narcotics or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact."

While there can be no doubt that the inspector in this case did the things denounced by the law, a similar contention was made and determined adversely to defendant in *People v. Braddock, supra,* (See the dissenting opinion in that case. [41 Cal. 2d 794, 803].)

Defendant also contends that the jury should have been instructed as to confessions. However, the record does not show that defendant ever made any confession. He talked with the arresting narcotics inspectors shortly after he was taken into custody. Then, as now, he insisted that he was prescribing in good faith for an ailment of his patient.

Defendant also complains that it was error to refuse his proposed instruction to the effect that an act committed or an omission made under ignorance or mistake of fact which disproves any criminal intent is not a crime. This subject was adequately covered by other instructions given.

Defendant argues several other errors in the refusal of instructions. Without repeating each one, it may be said that the instructions read as a whole fully and fairly advised the jury as to the law upon all issues in the case. There was no error in the giving or refusal of any of them.

Finally, with reference to the defendant's contention that the law under which he was convicted is unconstitutional. He argues that this is so because in the code sections the words "except in the regular practice of his profession" are used. And that this language is too vague. uncertain and indefinite to form the basis of a criminal prosecution.

Tried by the standards laid down in *Lorenson v. Superior Court,* 35 Cal. 2d 49, this language is sufficiently certain to comply with constitutional requirements.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

DRAPEAU , J.

We concur:

WHITE , P. J.

DORAN , J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANC

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	Crim.
vs.	)	No. 5748
LESLIE ROBERT NUNN, Defendant and Appellant.	)	

FILED May 8, 1956.

WILLIAM I. SULLIVAN, *Clerk*

By....., *S. F. Deputy*

After trial before a jury defendant, an osteopathic physician, was convicted on four counts of prescribing narcotics for a person not under his treatment for a pathology, in violation of section 11163 of the Health and Safety Code.[1]

He was also convicted of one count of prescribing a narcotic for a person "who represented himself to be an addict," in violation of section 11164 of the same code.[2]

He appeals from the judgment and order denying his motion for a new trial.

About 3 p.m. on February 3, 1954, pursuant to instructions from his superior officer, who directed him

[1]Section 11163 of the Health and Safety Code reads: "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division."

[2]Section 11164 of the Health and Safety Code reads: "No person shall prescribe for or administer, or dispense a narcotic to an addict, or to any person representing himself as such, except as permitted by this division."

to use the name "Joe Dillon," State Narcotics Inspector Clarence A. Shaw went to the office of defendant, who was an osteopathic physician and surgeon licensed to practice in the State of California. Inspector Shaw entered the waiting room. Shortly thereafter defendant came from his private office, whereupon Inspector Shaw said, "I am Dillon," and defendant asked, "Are you the one Walter sent?" The inspector said he was.

The inspector and defendant went into the doctor's private office where defendant asked the inspector his first name, to which he replied that it was "Joe." Defendant asked him his address and was told that it was "2903 Rodeo Road, Los Angeles." The doctor entered this information on his patient's history card, together with the inspector's age, sex and race. Defendant then handed the card, which had no writing on it other than that heretofore mentioned, to the inspector, requesting him to sign it on the line where he had placed an "x." Defendant asked the inspector what he was using, to which he replied, "I am using H," which in the vernacular means heroin. Defendant said, "I cannot write a prescription for heroin, but I can write for some legitimate drug like morphine or dilaudid." The inspector said that would be all right.

Defendant then wrote and signed a narcotics prescription calling for 60 tablets of 1/16 grain dilaudid to be taken one or two every four hours as needed. Defendant handed the prescription to the inspector and charged him $20.

On the patient's history card which was received in evidence there had been filled in "1. Migraine Headache" and "2. Narcotic Addiction" below the space provided for "Diagnosis."

On February 11, 1954, at about 2 p.m., Inspector Shaw went to defendant's home at 99 Las Flores Canyon Road, Malibu. Defendant was fixing the mail box on his property by the main road. Inspector Shaw said to defendant, "Hello," and defendant asked him if he had a pen. The inspector replied that he did not, and defendant said, "My prescription books are in the car, but I will have to get my pen."

They both went in separate cars to the house, which was a short distance from the mail box. At the house defendant wrote and signed a prescription in a prescription book. Defendant asked for the inspector's address again, and the inspector said it was 2903 Rodeo Road. Defendant asked him if 80 tablets would hold him for a week, to which the inspector replied that it would. The inspector told defendant that he liked that very much, and asked if he could come there again the next week. Defendant replied that it would be all right.

Defendant gave the prescription, which called for 80 1/16th grain tablets of dilaudid, to the inspector, who paid $50 for it.

On February 18, 1954, at about noon, Mr. Shaw drove to defendant's home in Malibu. Defendant answered the inspector's knock at the door and they both walked out to the car, where defendant asked Mr. Shaw if 85 tablets would hold him. The inspector said

that it would and that he would be out of town the next week so he wanted to go to defendant's office on the 24th of February. Defendant said that would be all right.

Defendant then wrote and signed a prescription for 85 tablets of 1/16th grain dilaudid and gave it to the inspector, who paid him $40 for it.

On February 24, 1954, Mr. Shaw went to defendant's office in West Los Angeles about noon. There the doctor started to write a prescription and asked him if his address was 2903 Rodeo Road. The inspector said that it was, and the defendant said that as soon as they got the physical examination out of the way he could write a prescription for more than 100 tablets. This was the only time in the various interviews that there was any mention of the inspector's physical condition.

He was then given the prescription, which called for 85 1/16th grain dilaudid tablets, and he paid defendant $40 for it.

Defendant never made any physical examination of Inspector Shaw nor did the inspector ever tell defendant that he had any physical ailment other than that he was using heroin. He never at any time told defendant that he suffered from migraine headaches or any physical ailment, nor was he during this period confined in any medical institution of the state, county or city, and he was not under treatment in any institution for any ailment or for narcotic addiction. He in fact did not use narcotics.

Defendant relies for reversal of the judgment upon these grounds:

First: That the evidence was insufficient to support the verdicts.

This contention is devoid of merit. From the facts set forth above, the jury was fully justified in believing that defendant had on four different occasions violated section 11163 of the Health and Safety Code by prescribing a narcotic to or for a person not under treatment for a pathology or condition other than narcotic addiction. (Cf. *People v. Whitlow,* 113 Cal. App. 2d 804, 807 [6]; *Davis v. State Board of Medical Examiners,* 108 Cal. App. 2d 346, 352.) Also that defendant had violated the provisions of section 11164 of the Health and Safety Code in that he had prescribed a narcotic for a person representing himself as a narcotic user. (Cf. *Davis v. State Board of Medical Examiners,* 108 Cal. App. 2d 346, 350 *et seq.)*

Defendant asked Inspector Shaw, "What are you using?" and the inspector said, "I am using H," which in the vernacular means heroin. Defendant clearly understood that it meant heroin, which is a contraband drug, because he answered, "I cannot write a prescription for heroin but I can write for some legitimate drug like morphine or dilaudid." He then wrote a prescription for dilaudid and gave it to the inspector. The conclusion is inescapable that Inspector Shaw represented himself to be an addict, that defendant believed he was an addict and prescribed a narcotic for him in a manner not permitted by law.

Second: That the court committed prejudicial error in the admission of evidence.

Defendant contends that Inspector Blanchard was improperly permitted to give his opinion that most narcotic addicts are caused by criminal association and not by the medical profession was erroneously admitted because it was rebuttal of a collateral matter brought out on cross-examination by the prosecution and was immaterial to the issues of the trial.

This contention is untenable. Defendant on direct examination testified that he believed on February 3, 11, 18 and 24, 1954, that "Dillon" was suffering from a migraine headache for which he had previously taken heroin and might be an addict, and that he prescribed the narcotic in the belief that he was properly treating Dillon for a pathology by relieving his pain.

The People were justified in believing it would be contended, defendant was acting reasonably and in the ordinary practice of his profession in prescribing the narcotic in the amounts that he did, since he had no reason to know or believe that such pathology did not exist but had reason to believe that it did.

It was therefore appropriate to ask defendant concerning the reasonableness of his conduct and to bring out in connection with such reasonableness that defendant believed it was quite possible that a person using narcotics for the relief of a pain would become addicted to the narcotic. Also that he believed the majority of narcotic addicts were produced that way. The deduction could then be made by the jury that most narcotic

addicts suffered from pain for which they had first taken the narcotics to which they became addicted, and that it was more likely a person who was addicted would suffer from a painful pathology. This would support defendant's position that he believed that "Dillon" was suffering from a painful pathology.

This deduction could reasonably be controverted by showing that it was not true that most addicts are created by the medical profession through the use of narcotics to relieve pain.

To forestall such a deduction and not to impeach defendant, the People properly presented the opinion of Inspector Blanchard on the subject.

The evidence disclosed that Inspector Blanchard had a knowledge of the causes of narcotic addiction, gained through experience in interviewing addicts and study, not possessed by the average man. He thus qualified as an expert and as such his opinion was properly received. (*People v. Ernst,* 121 Cal. App. 2d 287 at 292; *People v. Horowitz,* 70 Cal. App. 2d 675, 689 [13].)

Third: That section 11163 of the Health and Safety Code is unconstitutional because the term "except in the regular practice of his profession" is too vague, indefinite and uncertain to give notice of what constitutes the act sought to be prohibited.

This proposition is devoid of merit. To comply with the constitutional requirement of due process of law, the crime for which defendant is being prosecuted must be clearly defined, but it is only necessary that

the words used in the statute be well enough known to enable those persons within its purview to understand and correctly apply them. *(Lorenson v. Superior Court,* 35 Cal. 2d 49, 60 [7].)

Section 2137 of the Business and Professions Code provides: "The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions."

Sections 11161 to 11571 of the Health and Safety Code give physicians and surgeons certain rights with regard to narcotics and prohibit certain acts with regard to them.

Business and Professions Code sections 2360 through 2411 provide for revocation of the certificate of a physician and surgeon for "unprofessional conduct" and specify numerous acts which constitute unprofessional conduct. The "regular practice of his profession" covers the activity allowed by Business and Professions Code section 2137 and those parts of the Health and Safety Code which give the physician and surgeon certain rights with regard to narcotics, as long as that activity is untainted by any of the acts which specifically constitute unprofessional conduct or acts which are prohibited by the Health and Safety Code. Thus, the "regular practice of his profession" is a term clearly to be understood from the statutes,

and it is well enough known to enable a person practicing as a physician and surgeon to understand and apply it. Therefore, section 11163 of the Health and Safety Code is constitutional.

Defendant further contends that section 11330 of the Health and Safety Code is unconstitutional because the term "good faith" is too vague, indefinite and uncertain to form the basis of a criminal prosecution. This section reads:

> "A physician may prescribe for, furnish to. or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction.
>
> "The physician shall prescribe, furnish, or administer narcotics only when in good faith he believes the disease, ailment, injury, or infirmity, requires such treatment.
>
> "The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as are reasonably necessary."

A similar contention was made before the Supreme Court of Illinois in *People v. Guagliata,* 200 N.E. 169. In disposing of the contention and holding that the words "good faith" have a common and generally accepted meaning, the court at page 171 said: "The words complained against have been defined in many cases in many jurisdictions. In *Crouch v. First Nat. Bank,* 156 Ill. 342, 40 N.E. 974, 979, we said that 'good faith' means, 'honest, lawful intent,' and in *McConnel v. Street,* 17 Ill. 253, we said that 'good faith' is the

'opposite of fraud and bad faith.' Numerous cases in other jurisdictions give substantially similar definitions. A liberal construction should be given constitutional provisions in order to sustain legislative enactments, and all doubts and uncertainties arising from the Constitution, as well as the statute, should be resolved in favor of the validity of the statute. (Citing cases.) The words 'good faith,' as used in paragraph 3, have a definite and well-understood meaning, are free from ambiuity, and their use in the act does not violate the due process clause of the State or Federal Constitution. (Citing cases.)"

The phrase "good faith" in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. (See 18 Words and Phrases (perm. ed. 1940), p. 475 *et seq.;* 35 C.J.S. (1943), p. 488; Bouvier's Law Dictionary (Rawle's 3rd rev. 1914), p. 1359.)

We therefore hold that the words "good faith" as used in Health and Safety Code section 11330 have a definite and well-understood meaning, are free from ambiguity, and their use in the statutes does not violate the due process clause of the federal Constitution.

Defendant further contends that the statutes of the Health and Safety Code are unconstitutionally applied in that the inspectors from the State Bureau of Narcotics Enforcement, rather than defendant, were

allowed to determine whether or not defendant acted "in the regular practice of his profession" and in "good faith." This is not the case. The narcotic inspectors testified to certain facts; defendant testified to others. The determination of whether defendant acted "in the regular practice of his profession" and in "good faith" was left to the jury, which believed the facts were as testified to by the inspector, and that such facts did show that defendant had not acted "in the regular practice of his profession" and in "good faith."

Fourth: That Health and Safety Code section 11164 is unconstitutional because (1) the Legislature cannot deprive a doctor of the right to prescribe for any patient, including one who may be an addict, and (2) the section leaves the subject of who constitutes an addict to speculation and conjecture.

This proposition is untenable. (1) The Legislature has the power to regulate the practice of a profession which affects the public health and safety. (Cf. *Hewitt v. Board of Medical Examiners,* 148 Cal. 590 at 592; *People v. Ratledge,* 172 Cal. 401 at 405.) (2) Addict is defined in section 11009 of the Health and Safety Code as follows: " 'Addict,' as used in this division, means a person who unlawfully uses, or is addicted to the unlawful use of, narcotics." Therefore, the question of who constitutes an addict is not left to speculation and conjecture, but is clearly and definitely defined by law.

Fifth: That defendant was unlawfully entrapped.

This contention is likewise without merit. The trial judge fully and completely instructed the jury upon the law relative to entrapment.

Defendant claims that the narcotics inspector's acts in giving a false name and address and telling him he was using "H" were illegal and that a conviction resulting from the use of evidence secured by such acts is against public policy, void, and a denial of the due process of law.

Health and Safety Code sections 11170 and 11170.5 forbid any person to "obtain or attempt to obtain narcotics (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact," or to give a false name or address in connection with the prescribing of a narcotic.

Health and Safety Code section 11710 provides: "All duly authorized peace officers, while investigating violations of this division in performance of their official duties, and any person working under their immediate direction, supervision or instruction, are immune from prosecution under this division."

Health and Safety Code sections 11170, 11170.5 and 11710 are all in division 10 of such code, as are sections 11163 and 11164, a violation of which sections defendant was found guilty.

Duly authorized peace officers, while investigating violations of Health and Safety Code sections 11163 and 11164 are immune from prosecution for violating such sections. Since Shaw was (a) a narcotics inspec-

tor for the State of California, and (b) was acting pursuant to the orders of his chief, Walter Creighton, who told him to go to defendant's office and use the name "Joe Dillon" to see if defendant would write a prescription for narcotics for him, the inspector was clearly engaged in enforcing the laws regulating the prescribing of narcotics by investigating to see whether or not defendant had an existing intention of ignoring the laws forbidding his prescribing narcotics except under certain specified circumstances, and was performing his official duties.

He was immune from prosecution while investigating violations of the provisions of sections 11170 and 11170.5 of the Health and Safety Code. Thus, contrary to defendant's contention, he was not violating any law and his acts were not illegal when he gave a false name and address in attempting to buy narcotics from defendant. (See *United States v. Swift,* 186 F. 1002 at 1017.) Because the inspector was immune from prosecution for the acts which he performed, there is no merit in defendant's contention that he was an accomplice to the issuance of the prescriptions in violation of Health and Safety Code sections 11163 and 11164, as an accomplice must be liable for prosecution for the identical offense charged against the defendant. (Pen. Code, §1111.) Here the inspector was immune from such prosecution.

Defendant urges certain language used in *People v. Cahan,* 44 Cal. 2d 434 at 472, in support of his contention that the People should not be permitted to use

the evidence obtained by the narcotics inspector because he procured it by false representations. The language used in the *Cahan* case had reference to the facts in such case and has no application to such facts as the record discloses in the instant proceeding.

This court has held that where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he commits a crime, raises no inference of unlawful entrapment. (*People v. Braddock,* 41 Cal. 2d 794 at 802 [10].) Also that entrapment as a matter of law is not established where there is any substantial evidence from which it may be inferred that criminal intent to commit a particular offense originated in the mind of the accused. (*People v. Terry,* 44 Cal. 2d 371 at 372 [2].)

In the instant case it is clear that the jury was justified in finding from the evidence that the criminal intent originated in the mind of defendant and therefore the mere fact that he was solicited by a decoy to commit the crime raises no inference of an unlawful entrapment.

Sixth: That the trial court erred in refusing to give certain instructions requested by defendant.

This contention is devoid of merit. An examination of the record shows that the trial judge fully, fairly and clearly advised the jury on each and every material issue and that the instructions requested by defendant and refused were either covered by instructions read by the judge to the jury or were not applicable to the facts in the instant case.

The judgment and order denying a new trial are each affirmed.

McCOMB , J.

We concur:

GIBSON , C. J.
SHENK , J.
TRAYNOR , J.
SCHAUER , J.
SPENCE , J.

[TITLE OF COURT AND CAUSE.]

DISSENTING OPINION

I dissent.

I cannot agree that any law of the State of California permits an officer to go about using a fictitious name and make false statements to induce a doctor to prescribe a narcotic or medicine that requires a prescription for a patient, and to misrepresent that he is such patient. Such conduct, whether by an officer, or anyone else, violates sections 11170, 11170.5 and 11171 of the Health and Safety Code.

Section 11170 of the Health and Safety Code provides as follows:

> "(1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact. . . . (3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or

represent himself to be [here follows a list of authorized persons] *or other authorized person. . . .* " (Emphasis added.)

Section 11170.5 of the Health and Safety Code says:

"No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

Section 11171 reads:

"*No person* shall obtain or possess a prescription that does not comply with this division." (Emphasis added.)

It is plain from the foregoing that the officer violated every one of these mandates of the Legislature. He obtained each of the prescriptions involved in this case (a) by fraud, deceit, misrepresentation, and subterfuge; and (b) he concealed a material fact, namely his true identity.

He represented himself to be an authorized person, which he was not.

He obtained and possessed prescriptions that did not comply with the provisions of the Health and Safety Code. Thereafter he falsely had them filled in violation of section 11170 of the Health and Safety Code.

The Legislature clearly intended these sections to apply to *all persons.*

False and fictitious use of one's name and misrepresentation of one's character are fraud and deceit,

which the statute expressly forbids. Fraud vitiates everything. It nullifies judgments obtained thereby.

If these statutes that expressly forbid *any person* to use these means, are changed by judicial construction, to authorize an officer to obtain a prescription (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by concealment of a material fact, or by giving a false name or address, or obtain or possess a narcotic that does not comply with these provisions of the Health and Safety Code, then such sections, if thus construed and applied, violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. That constitutional guarantee provides for American standards for the administration of justice and conduct consistent with the fundamental principles of liberty and justice must lie at the base of all our civil and political institutions. (*Hebert v. Louisiana,* 272 U.S. 312, 316; *Twining v. New Jersey,* 211 U.S. 78, 100; *Palko v. Connecticut,* 302 U.S. 319, 323, 325, 326; *Francis v. Resweber,* 329 U.S. 459, 463; *Adamson v. California,* 332 U.S. 46, 53; 171 A.L.R. 1223.)

The obtaining of a prescription from a duly licensed doctor by means of fraud, deceit and misrepresentation—in violation of the express commands of the Legislature—is reprehensible, unlawful, and contrary to the conscience of mankind. This court is not authorized to legislate that it is lawful or to condone it judicially. If it does, then the statutes, as thus construed, violates the Fourteenth Amendment to the Constitution of the United States.

If the knowing presentation of perjured testimony in a criminal prosecution amounts to the denial of due process of law (*Mooney v. Holohan*, 294 U.S. 103), it should follow as a matter of course that evidence obtained by means of fraud, deceit and misrepresentation should have the same effect.

The purity of the courts belongs to the courts. (*Sorrells v. United States*, 287 U.S. 435; *People v. Cahan*, 44 Cal. 2d 434 [282 P. 2d 905] and cases cited therein.)

When the officer in this case falsified his name and character he acted in an individual capacity, for the state did not authorize him to act falsely and fraudulently and to violate the express provisions of the Health and Safety Code. But if we approve such conduct then we become a party to it. This the court cannot do, lest the citizen shall say, "If the officer can falsify, why can't we" Courts of justice must set an example of truth and justice and equal application of the law's mandates to officers and citizens alike, lest the bad example of one shall lead to misconduct of the other. Civilized standards of due process guaranteed by the federal Constitution forbid this.

I do not think this court or any court should ratify, adopt and approve such lawless disregard of honesty, decency and the express and plain provisions of the Health and Safety Code as written and adopted by our lawmakers.

For the foregoing reasons and those stated in my dissenting opinion in *People v. Braddock,* 41 Cal. 2d 794, 803, I would reverse the judgment and grant defendant a new trial.

CARTER, J.

31/31

NOV 19 1956

JOHN T. FEY, Clerk

No. 326

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

LESLIE ROBERT NUNN,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

PETITION FOR REHEARING

MORRIS LAVINE,
620 Bartlett Building,
215 W. 7th Street
Los Angeles 14, California
Attorney for Appellant.

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

LESLIE ROBERT NUNN, *Appellant,* vs. THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*	No. 326

PETITION FOR REHEARING

We petition for rehearing on the following grounds:

The Court has overlooked the mandatory provisions of Section 1257 (2) wherein the constitutionality of a statute has been challenged in the state court "on the grounds of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

Congress has made mandatory the right of appeal in such cases.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;

Memphis Natural Gas Co. v. Beeker, 315 U. S. 64.

We challenged the constitutionality of the sections of the code for vagueness in the state courts. The District Court of Appeal held against our challenge (see page 10 Appendix, original petition, opinion of District Court of Appeal. Again we challenged the constitutionality in the Supreme Court of California, and that court held against our challenge (pages 17 *et seq.* of appendix, Opinion of Supreme Court).

One justice of the Supreme Court of California held Section 11170 of the Health and Safety Code of California unconstitutional as construed and applied. The majority ruled *contra.*

From these decisions we took a direct appeal. The order of November 5, 1956 dismissed the appeal without reason given. No motion is pending to dismiss it. We respectfully submit we come within the mandatory provisions of Title 28 Section 1257 (2) as construed by this court.

On the same day this court dismissed the appeal it handed down a historic and all-important decision in *Mesaroh v. United States,* in which it condemned "tainted justice."

Nothing could in our view be more tainted than the introduction and use of evidence obtained by the state officer in violation of the very laws of the state and by fraud, deceit, misrepresentation and subterfuge.

As stated by the California dissenting justice in his opinion:

> "If the knowing presentation of perjured testimony in a criminal prosecution amounts to a denial of due process of law (*Mooney v. Holohan*, 294 U. S. 103) it should follow as a matter of course that evidence obtained by means of fraud, deceit and misrepresentation should have the same effect."

In the *Mesaroh* case the government admitted its witness was a perjurer. In the *Nunn* case the State's own testimony was that the officer—the one witness on whom the People relied for proof of the offenses—had done the things denounced by law—to-wit, had obtained the evidence by means of fraud, deceit, misrepresentation and subterfuge. His testimony is not only subject to close scrutiny (*Gordon v. U. S.*, 344 U. S. 414). It must be rejected to preserve the purity of the courts.

The defense also had offered an instruction to the jury, which the court had declined to give, that the statute forbade any person from obtaining a prescription by means of fraud, deceit, misrepresentation and subterfuge, so that the jury might weigh the credibility of the officer, as it might, in a third degree case upon the giving of instructions, weigh the voluntari-

ness of a confession. (*Lisenba v. California,* 314 U. S. 219).

Where, as here, the conduct of the officer is admitted, and not in dispute, the matter becomes one of law for this court to determine whether the statutes, inherently and as construed and applied in this case, violate the due process clause of the Fourteenth Amendment. (*Irvine v. California,* 347 U. S. 128).

We pray for rehearing and the noting of probable jurisdiction of the appeal.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, Morris Lavine, Attorney for the appellant, hereby certify that this petition for rehearing is filed in good faith and not for the purpose of delay, and is based upon matters occurring since the filing of the jurisdictional statement on appeal, and is restricted to those grounds.

MORRIS LAVINE
Attorney for Appellant.
620 Bartlett Building,
215 West 7th Street,
Los Angeles 14, California

NOVEMBER 5, 1956.

Decisions Per Curiam.

No. 326. NUNN *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Morris Lavine* for appellant. Reported below: 46 Cal. 2d 460, 296 P. 2d 813.